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Supreme Court, U.S.
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No. 85-21

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

SQUARE D COMPANY AND
BIG D BUILDING SUPPLY CORP.,
Petitioners,

v.

NIAGARA FRONTIER TARIFF BUREAU, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENTS' JOINT BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court overrule its decision in *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922), which was reaffirmed in *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1945), was preserved by Congress, and has been cited with approval by this Court and applied consistently by the lower courts for more than sixty years?

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RESPONDENTS' JOINT BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

This antitrust damage action is based upon common carrier rates regulated pursuant to the Interstate Commerce Act ("ICA"). Under that Act, freight rates charged by motor common carriers must first be filed with the Interstate Commerce Commission ("ICC") in published tariffs, and it is a criminal violation for a carrier to charge anything but the filed rate. 49 U.S.C. §§ 10761-

10762, 11903(a) (1982).[1] Further, Congress granted the ICC plenary power over motor carrier rates, including the authority to determine whether such rates are unreasonably high or unjustly discriminatory. *Id.* at §§ 10701, 10741. The Commission is authorized, either on its own motion or on shipper complaint, (1) to suspend proposed rates, (2) to investigate rates and (3) to invalidate rates that do not comply with Congressional policy. *Id.* at §§ 10704, 10708. Shippers may also seek reparations for excessive rates. *Id.* at § 11705(b)(3). In addition, as this Court held last term in *ICC v. American Trucking Associations, Inc.*, 104 S.Ct. 2458, 2466 (1984) (*"ATA"*), the ICC has statutory authority to nullify tariffs retroactively and thereby to require carriers to "disgorge" rate increases found by the Commission to be the product of substantial violations of approved rate bureau procedures.

Petitioners are shippers of goods by truck who brought suit under the federal antitrust laws seeking treble damages from, and injunctive relief against, five Canadian motor carriers and their rate bureau.[2] The complaints charge that the Respondents' collective ratemaking between 1966 and 1981 exceeded the statutory immunity embodied in the Reed-Bulwinkle Act, 62 Stat. 472 (1948), because of a failure to follow rate bureau procedures and efforts to forestall independent rate action.[3] Petitioners claim not that they were charged other than the filed rates, but that they were damaged because those rates were excessive.

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[1] As this Court has recognized, Congress intended "to prevent any kind of departure from the published rates." *United States v. Braverman*, 373 U.S. 405, 406 (1963).

[2] The identity of the Respondents and other information required by Rule 28.1 is set forth in Appendix A.

[3] These cases followed a Department of Justice civil injunction action, which was ultimately terminated by entry of a consent decree that governs the manner in which Respondents can set rates collectively. *United States v. Niagara Frontier Tariff Bureau, Inc.*, 1984-2 Trade Cas. (CCH) ¶ 66,167 (W.D.N.Y. 1984).

It is undisputed that the rates in issue here were at all times duly filed with the ICC, and never set aside, disapproved or nullified by the Commission.[4] Nor have Petitioners ever challenged Respondents' rates or ratemaking conduct before the ICC, or otherwise sought damages or other relief under the Interstate Commerce Act. Instead, they brought these federal court antitrust actions, which seek treble damages measured by the difference between the rates that the Respondents periodically filed with the ICC and hypothetical lower rates that Petitioners contend would have been filed with the Commission, and would have been lawful under ICA standards, absent the claimed illegality.

The district court granted Respondents' motion for judgment on the pleadings based upon this Court's decisions in *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922) and *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1945). The court held that, under *Keogh* and *Georgia*, shippers have no damage claim under the antitrust laws based on "tariff rates which were filed with the ICC and subject to that agency's regulatory control." *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 596 F. Supp. 153, 154 (W.D.N.Y. 1984). The district court also noted that the *Keogh* decision rejecting this damage theory had been "consistently applied" by the courts. *Id.* at 154-55.

A unanimous panel of the Second Circuit, composed of Chief Judge Feinberg and Judges Kaufman and Friendly, affirmed dismissal of the damage claim. *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1347 (2d Cir. 1985). The opinion written by Judge Friendly canvassed both the history of the *Keogh* doctrine and subsequent legislative and judicial developments. The court, while questioning the currency of *Keogh*'s reasoning, concluded that *Keogh* had been reaffirmed by this

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[4] *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1347, 1364 (2d Cir. 1985).

Court, had been preserved by Congress, had been consistently applied by the lower courts, and therefore remained good law.

In particular, the court of appeals examined the legislative history of the Reed-Bulwinkle Act, and rejected Petitioners' assertion that the Act had overruled *Keogh*. The court determined that, in passing Reed-Bulwinkle, Congress was well aware of the existence of the *Keogh* and *Georgia* decisions and did not intend, by immunizing certain ratemaking conduct, to upset settled law limiting the scope of antitrust damages. On the contrary, Congress affirmatively expressed an intent to preserve *Keogh* by stating that the antitrust laws should continue to operate only "so far as they are now applicable." *Id.* at 1359.

The appellate court also rejected Petitioners' argument that this Court's decision in *ATA* had somehow overruled *Keogh* and *Georgia*. Judge Friendly noted that *ATA*'s holding dealt only with remedies under the Interstate Commerce Act, and that the opinion did not even mention *Keogh*. *Id.* at 1364 & n.12.[5] The *ATA* Court had indicated in dictum the possibility of antitrust damage recoveries for unlawful rates, but only *after* those rates had been disapproved by the ICC. 104 S.Ct. at 2462. The Second Circuit held that this proposition is irrelevant here because the rates challenged by Petitioners have never been disapproved, set aside or held unlawful by the ICC. 760 F.2d at 1364.[6]

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[5] The Second Circuit rejected on the same grounds Petitioners' suggestion that *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966), is inconsistent with *Keogh*, holding that "if the Court intended to overrule *Keogh* or even seriously to question that decision, it would have discussed or at least mentioned the fact," which it did not. 760 F.2d at 1362. The court below also noted that *Carnation* arose under the Shipping Act, an entirely different regulatory scheme. *Id.* at 1362.

[6] Petitioners do not contend that *ATA* can be read any more broadly than the Second Circuit did, Petition at 17, nor do they dispute the holding of the court below that even this reading of *ATA* has no applicability to the present case because the rates in question were never disapproved by the ICC. Further, having read *ATA* as referring to "disapproved" rates, Petitioners do not explain why they claim that *ATA* is "incompatible" with *Keogh*, which says that the filed rate is the only lawful rate "unless and until suspended or set aside" by the ICC. 260 U.S. at 163.

Consequently, the Second Circuit affirmed the decision of the district court to the extent that it barred Petitioners' damage claims premised on the difference between the lawful rate, as actually filed with the ICC in published tariffs, and some hypothetical rate. The court remanded the matter, however, to allow Petitioners an opportunity to pursue alternative damage claims, as well as their claims for injunctive relief. This petition followed.

REASONS FOR DENYING THE WRIT

This Petition raises no novel or important question of law. The issue of statutory interpretation presented here was decided by this Court in *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922). Twenty-three years later, in *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1945), this Court reaffirmed and clarified *Keogh* in a manner that leaves no doubt that it is directly controlling on the facts of this case. The clear holding of both cases is that, while anticompetitive conduct by common carriers remains subject to criminal prosecution and equitable remedies, Congress intended that shippers pursue damage claims based on filed rates before the ICC, not in the antitrust courts.

Keogh and *Georgia* have been consistently applied by every court that has had any occasion to consider cases such as this one during the past sixty years, including the Court of Appeals for the Second Circuit below. There is no split in the circuits, this Court has consistently cited *Keogh* and *Georgia* with approval, *see, e.g., McLain v. Real Estate Board*, 444 U.S. 232, 243 (1980) and

United States v. Philadelphia National Bank, 374 U.S. 321, 350-51 & nn.28, 29 (1963), and as recently as last term this Court rejected the opportunity to overrule *Keogh* by denying a petition for *certiorari* that is indistinguishable from this one for any relevant purpose. *Minsky v. Auto Driveaway*, 105 S.Ct. 435 (1984). Moreover, the limitation on treble damages prescribed by *Keogh* and *Georgia* has been preserved by Congress in the course of re-examining the relationship between the Interstate Commerce Act and the antitrust laws. There is therefore no reason for this Court to reconsider *Keogh* at this late date.

1. The *Keogh* doctrine has been uniformly and properly applied by the courts.

In the six decades since *Keogh*, no court has ever allowed a shipper to maintain an antitrust damage action based on rates embodied in tariffs filed with the ICC. The holding in *Keogh* has been followed by every court presented with the issue in shipper cases, and applied with a consistency rare in the field of antitrust jurisprudence.

In *Keogh*, a shipper sued eight railroads for price-fixing, claiming damages based on the difference between the filed rate and some hypothetical rate that would have existed absent the alleged conspiracy. A unanimous Court, per Justice Brandeis, rejected this damage theory. After first recognizing that the underlying conduct remained subject to government prosecution, this Court held that Congress, having enacted in the Interstate Commerce Act a comprehensive scheme of shipper rights and remedies for excessive or discriminatory rates, did not intend to grant an additional damage remedy in the antitrust courts that could frustrate the ICC's administration of the regulatory statute. 260 U.S. at 161-62. Under the Interstate Commerce Act, the lawfulness of a filed rate is for the ICC to determine:

> The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside [by the ICC], this [filed] rate is made for *all purposes* the legal rate as between shipper and carrier. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.

Id. at 163 (emphasis added). Thus, as to damage theories that implicate filed rates, the Court held that the ICC remedy was exclusive, a ruling based on the "plain repugnancy between the antitrust and regulatory provisions." *United States v. Philadelphia National Bank*, 374 U.S. 321, 350-51 & n.29 (1963).[7]

In *Georgia*, the state, suing in part as a shipper, charged the defendants with an illegal conspiracy to impose excessive and discriminatory transportation rates by coercing rate bureau members. 324 U.S. at 444-45. The complaint sought damages based on filed rates, as well as injunctive relief, and this Court held that the damage claims were barred:

> We think it is clear from the *Keogh* case alone that Georgia may not recover damages even if the conspiracy alleged were shown to exist.

Id. at 453. But the Court sustained the injunction claims because the underlying conduct, as opposed to the filed rates, was outside the ICC's jurisdiction. *Id.* at 458.

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[7] In this connection, the *Keogh* Court was also concerned with allowing an antitrust jury to speculate, and substitute its judgment for that of the expert agency, as to the lawfulness of a hypothetical rate under the ICA. 260 U.S. at 164-65. Judicial "speculation about what [a regulatory] Commission might have done" under hypothetical circumstances is still disfavored, *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578-79, 581 n.11 (1981), and is a qualitatively different matter than determining the "competitive" rate in an unregulated market. *See also, In re Wheat Rail Freight Rate Antitrust Litigation*, 759 F.2d 1305, 1313 (7th Cir. 1985), *petition for cert. filed*, No. 85-112 (holding that determination of hypothetical rate lawfulness under the ICA would be an "impossibly speculative task").

Petitioners' attempt to distinguish *Keogh* from this case on the facts is not only an issue unworthy of this Court's attention, but is unavailing. Petition at 7-8. Indeed, the *Georgia* case—which Petitioners fail to cite even once—is flatly inconsistent with the assertion that *Keogh* does not apply where (1) the ICC has not approved the rate or (2) there are allegations of coercion. First, as the Second Circuit noted, *Georgia* applied *Keogh* even though the rates at issue had been filed with, but never approved or disapproved by, the ICC. 760 F.2d at 1356.[8] Second, the *Georgia* Court upheld *Keogh* as a bar to treble damage recovery notwithstanding that the alleged conspiracy extended beyond mere collective ratemaking to efforts to coerce other carriers wishing to file independent rates. 324 U.S. at 444, 457-59.[9]

As to shipper antitrust damage claims, *Keogh* and *Georgia* have been consistently and properly applied by the lower courts in the intervening years. The unbroken line includes the Second Circuit's opinion below and three recent decisions by the Seventh Circuit. *In Re Wheat Rail Freight Rate Antitrust Litigation*, 759 F.2d 1305 (7th Cir. 1985), *petition for cert. filed*, No. 85-112; *Minsky v. Auto Driveaway*, 757 F.2d 718, *cert. denied*, 105 S.Ct. 435 (1984); and *Board of Trade v. ICC*, 646 F.2d 1187 (7th Cir. 1981). In addition, three district courts—from the Third, Ninth and Second Circuits—have applied the doctrine, most recently in *In Re Lower Lake Erie Iron Ore Antitrust Litigation*, MDL 587, slip op. (E.D. Pa. June 5, 1985) (Appendix B). *See also, Asbury Graphite, Inc. v. Dehyco Co.*, 1981-1 Trade Cas. (CCH) ¶ 63,980 (N.D. Cal. 1980); and *Monticello Heights, Inc.*

[8] Petitioners' distinction is also inconsistent with the language in *Keogh* that "[u]nless and until suspended or set aside," the filed rate is the only lawful rate. 260 U.S. at 163.

[9] Thus, Petitioners are entirely disingenuous in asserting that the "*Keogh* holding has not been reviewed by this Court since 1922." Petition at 6.

v. Morgan Drive Away, Inc., 1974-2 Trade Cas. (CCH) ¶ 75,282 (S.D.N.Y. 1974). *Keogh* has frequently been cited with approval by this Court,[10] and just last term this Court declined the opportunity to overrule it by denying a *certiorari* petition identical to this one in all relevant respects. *Minsky v. Auto Driveaway Co.*, 105 S.Ct. 435 (1984).[11]

In short, there is no inconsistency in the law, and Petitioners do not contend otherwise.

2. Congress has preserved the *Keogh* doctrine.

By creating express statutory immunity for certain common carrier collective ratemaking activity in the Reed-Bulwinkle Act of 1948, Congress did not intend, as Petitioners would have it, to supplant existing law on the scope of the antitrust damage remedy. To the contrary, the legislative history of that provision demonstrates that Congress was well aware of the *Keogh* doctrine and deliberately chose to preserve it.

As the Second Circuit opinion explained, the impetus for the Reed-Bulwinkle Act was provided by the antitrust enforcement actions *Keogh* had left open—criminal prosecutions and civil injunction actions directed against the collective ratemaking activities of ICC-regulated car-

[10] *See McLain v. Real Estate Board*, 444 U.S. 232, 243 (1980); *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 299-300 & n.12 (1973); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 260 (1972); *United States v. Philadelphia National Bank*, 374 U.S. 321, 351 n.29 (1963); *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 310 (1963); *United States v. RCA*, 358 U.S. 334, 347-48 (1959); *United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. 474, 485 (1932).

[11] It bears mention that the petition in *Minsky* was denied five months after this Court issued its decision in *ATA*. *See* Petition at 16-17.

riers. 760 F.2d at 1359-60.[12] Thus, it was antitrust sanctions other than shipper treble damage actions with which Congress was concerned, and the purpose of Reed-Bulwinkle was to relieve common carriers from such sanctions. The Second Circuit found no suggestion in the legislative history of any intent to overrule *Keogh*, nor any conflict between the *Keogh* doctrine and the Reed-Bulwinkle Act. *Id.* at 1360.

This conclusion flows from the documentation of numerous references to *Keogh* and *Georgia* in the Reed-Bulwinkle legislative history. *See id.* at 1359-60. Not only was Congress well aware of those cases, but, in granting immunity for certain ratemaking conduct, was "at pains to insert [a] qualifying phrase," *id.* at 1359, in the legislative history showing that it did not intend to override existing limitations on the scope of antitrust remedies:

> [t]he bill leaves the antitrust laws to apply with full force and effect to carriers, *so far as they are now applicable* . . . .[13]

The Reed-Bulwinkle history therefore supports the conclusion that Congress in 1948, far from intending to undermine *Keogh*, understood and approved of that decision.

In more recent times, Congress has enacted five statutes to amend regulation of common carriers by land,[14]

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[12] *See* S. Rep. No. 44, 80th Cong., 1st Sess. 5-6 (1947) *and* H.R. Rep. No. 1100, 80th Cong., 1st Sess. 4-5 (1947), *reprinted in* 1948 U.S. Code Cong. & Ad. News 1844, 1846-47. One of these instances was the *Georgia* case, because, as noted above, after dismissing the damage claims under *Keogh*, the Court went on to hold that an injunction action could be maintained. 324 U.S. at 455.

[13] S. Rep. No. 44, *supra*, at 7; H.R. Rep. No. 1100, *supra*, at 5, *reprinted in* 1948 U.S. Code Cong. & Ad. News 1844, 1848 (emphasis added).

[14] *See* 760 F.2d at 1355. The acts are the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976); the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980); the Household Goods Transportation Act of 1980, Pub. L. No. 96-454, 94 Stat. 2011 (1980); the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980); and the Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, 96 Stat. 1102 (1982).

yet it has never uttered a word in disapproval of the *Keogh* decision or otherwise acted to vitiate its regulatory underpinnings.[15] Indeed, contrary to Petitioners' statement (Petition at 15), the Second Circuit held that the Motor Carrier Act of 1980 "does not overrule *Keogh*." 760 F.2d at 1360 n.7. This record of continual legislative acquiescence in established Supreme Court precedent in the transportation field is to be contrasted with two contemporaneously-enacted antitrust remedy statutes, each of which specifically addresses a Supreme Court ruling of concern to Congress.[16] Where, as here, Congress has taken an active role in the field, and has affirmatively indicated an intent to preserve a ruling of this Court, there is no warrant for this Court to overturn its long-standing precedent.[17]

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[15] For an explanation of why recent legislation bearing on motor carriers neither specifically affects this case nor generally affects the ICC's rate regulation powers that underpin the *Keogh* decision, *see infra* at pp. 15-16.

[16] The Antitrust Reciprocity Act, Pub. L. No. 97-393, 96 Stat. 1964 (1982), responded to *Pfizer Inc. v. Government of India*, 434 U.S. 308 (1978), regarding the antitrust remedies of foreign governments; and the Local Government Antitrust Act, Pub. L. No. 98-544, 98 Stat. 2750 (1984), resolved the issue left open in *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982) whether local governments may be subject to antitrust damages.

[17] *See Southern Motor Carriers Rate Conference v. United States*, 105 S.Ct. 1721, 1726 n.18 (1985) (declining to abandon the implied antitrust immunity for state action "after over 40 years of Congressional acquiescence") *and Monsanto Co. v. Spray-Rite Service Corp.*, 104 S.Ct. 1464, 1473 (1984) (Brennan, J., concurring) (noting that the Court had declined the Solicitor General's invitation to reverse a 73-year-old statutory interpretation of the Court that Congress was aware of but had not overruled). *Cf. Flood v. Kuhn*, 407 U.S. 258, 283-84 (1972).

3. Departure from the principle of *stare decisis* on this question of statutory interpretation is unwarranted.

It is not this Court's practice to disregard basic principles of *stare decisis* and overrule its past decisions. This case does not present the occasion to depart from that settled principle.

First, as noted above, nothing in the manner in which *Keogh* and *Georgia* have been applied by the lower courts indicates that the doctrine has been a source of confusion or inconsistency; indeed the cases demonstrate the contrary.

Second, as also pointed out above, the *Keogh/Georgia* doctrine exists in an area in which Congress has been extraordinarily active—defining antitrust immunity in the transportation field and the scope of antitrust treble-damage remedies. Where Congress has been content with this Court's interpretation of its statutes, has taken affirmative steps to preserve such interpretation in legislative history, and where such an interpretation can be easily overturned by a simply-defined statutory amendment, adherence to the principles of *stare decisis* is particularly appropriate.

Third, Petitioners' arguments for overturning *Keogh* cannot be reconciled with prior decisions of this Court and Congressional action.

a. Petitioners argue that *Keogh* and *Georgia* have been overtaken by the judicial maxim that antitrust immunities are disfavored. Petition at 11. Their position collides with this Court's own explicit recognition in 1963 that both *Keogh* and *Georgia* were among the cases applying this maxim, and that *Keogh* itself was then one of only two cases in which "plain repugnancy between the antitrust and regulatory provisions" had been found. *United States v. Philadelphia National Bank*, 374 U.S. at 350-51 & nn.28 & 29. *See also Georgia v. Pennsylvania Railroad Co.*, 324 U.S. at 456-57 (recognizing that "repeals by implication are not favored" and may be found only where there is a "clear repugnancy").[18]

Moreover, as both *Keogh* and *Georgia* make plain, vindication of the ICC's jurisdiction over common carrier rates requires only a narrow limitation on antitrust damage remedies, not a blanket immunity for all violations.[19] Thus, conduct such as that alleged here—unauthorized and coercive price-fixing—remains subject to a wide range of antitrust remedies, including civil injunctions, criminal penalties and damage theories not based on filed rates. In addition, substantial violations of rate bureau procedures, as alleged by Petitioners, are subject to the ICC's authority to nullify rates retroactively, which this Court acknowledged in *ATA* would make the ICC, not the threat of antitrust liability, the "primary enforcer" of compliance with such procedures. 104 S.Ct. at 2467.[20]

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[18] A court may not, through the use of its equitable powers or through the award of damages, establish a rate or speculate as to what rate a regulatory agency would have established or approved. *Burlington Northern Inc. v. United States*, 459 U.S. 131, 140 (1982) (federal court may not enter an injunctive order "that operates to fix [ICC-regulated] rates"); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 584 (1981) (state court may not enter damage award that "amounts to a retroactive right to collect a rate in excess of the filed rate"); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951) (reasonable rate cannot be litigated in a judicial forum because there is no legal rate "other than the filed rate, whether fixed or merely accepted by the Commission"); *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 440-41 (1907) (recognition of a common law right to damages for rates charged by a common carrier is "wholly inconsistent with the administrative power" conferred on the ICC to regulate such rates).

[19] This Court expressly recognized in *Georgia*, while reaffirming *Keogh*, that carriers "have no immunity from the antitrust laws." 324 U.S. at 457.

[20] The Court in *ATA* was comforted because such a harsh remedy would be administered with discretion by the expert agency. 104 S.Ct. at 2466-67.

Through these enforcement mechanisms, compliance with antitrust and regulatory laws may be promoted, while the ICC's exclusive jurisdiction over rates is protected.[21]

b. Petitioners' added plaint that the application of *Keogh* leaves shippers without a remedy rings particularly hollow. First, as the Second Circuit held, shippers may assert any antitrust damage claims that do not implicate filed rates.[22] Furthermore, as this Court recognized in *ATA*, 104 S.Ct. at 2462-63, shippers have an entire panoply of remedies available to them under the Interstate Commerce Act, including the right to seek to have rates set aside by the ICC and the right to sue for reparations. 49 U.S.C. § 11705(b), (c) (1982).[23]

In addition, and of particular significance, this Court just last term in *ATA* approved an additional shipper remedy for rate bureau violations: *retroactive* nullification of the tariff. In so doing, the Court recognized that overcharge awards to shippers based on the difference between the nullified rate and the pre-existing rate "can easily surpass the damages for which carriers have historically been liable under § 11705(b)(3)," and may even

[21] In the shipper cases to which *Keogh* has been applied, these enforcement mechanisms have been freely employed. The *Iron Ore*, *Minsky* and *Morgan Drive Away* cases were all preceded by criminal prosecutions for rate bureau violations. This case, as noted, followed a civil injunction action by the government, and the defendants in *Georgia* also faced an injunction action. Finally, in *Wheat Rail*, the ICC thoroughly reviewed the challenged rates and specifically refused to nullify them, an exercise of discretion noted with approval by this Court in *ATA*. 104 S.Ct. at 2468 n.13.

[22] The district court has afforded Petitioners an opportunity to amend their complaints, and Petitioners have stated that they intend to do so.

[23] Petitioners cite *ATA* for the proposition that the ICC is unable to review on its own motion the hundreds of tariffs filed each year, omitting reference to the fact that the statute expressly lodges with shippers the right to initiate an ICC investigation through a complaint. 49 U.S.C. §§ 10704(f), 11701 (1982).

exceed treble damages under the antitrust laws. 104 S.Ct. at 2467. As the Court said:

> In effect, the Commission has informed all motor carriers submitting proposed tariff increases that the Commission will approve those increases subject to the condition that the carriers may be called upon to *disgorge* the increases if the Commission later discovers that the tariffs were submitted in substantial violation of a rate-bureau agreement.

Id. at 2466 (emphasis added). Noting that "[f]or a motor carrier, overcharge liability may be ruinous," the Court pointed out that the "effect of the . . . new remedy is to convert the ICC into the federal government's most potent enforcer of the antitrust laws for the purpose of insuring compliance with [rate bureau procedures]." *Id.* at 2467. The addition of the ICC's retroactive nullification authority to traditional ICA powers makes it clear that the remedies available to shippers today are greater than those at the time *Keogh* was decided.

c. Similarly, Petitioners assert that the *Keogh* rationale is outdated because the ICC now recognizes "a zone of reasonableness." Petition at 10-11. In fact, this concept is long-established, and was expressly acknowledged in *Keogh* and *Georgia*.[24] Nonetheless, this Court held that Congress had intended the validity of a filed rate to hinge solely on whether it was reasonable and nondiscriminatory, as determined by the ICC.

d. Finally, contrary to Petitioners' suggestion (Petition at 9), *Keogh* and *Georgia* have not been undermined by recent amendments to the Interstate Commerce Act, particularly as applied to this case. The regulatory scheme applicable to the rates in issue here was completely intact through all of the relevant time period

[24] The *Keogh* Court stated that "rates somewhat lower [than those in the filed tariffs] might also have been reasonable." 260 U.S. at 161. In *Georgia*, the Court stated: "A 'zone of reasonableness exists between maxima and minima . . . .'" 324 U.S. at 460-61.

(1966-1981). From 1966 until the Motor Carrier Act of 1980 became effective on July 1, 1980, there were no statutory changes. Even after that time, while modified in other respects, the ICC's authority with respect to collectively-set rates such as those challenged by Petitioners was not diminished.[25] Those rates continue to be embodied in filed tariffs with which the carriers must comply, the ICC remains fully empowered to determine whether they are reasonable and nondiscriminatory, and the Commission may investigate, suspend, and invalidate such rates. 49 U.S.C. §§ 10701, 10704, 10708, 10741, 10761-10762 (1982). The exclusive authority of the ICC to regulate motor carrier rate levels and structures and to invalidate filed rates, which lies at the heart of this Court's holdings in *Keogh* and *Georgia*, is as vital today as it was in 1922 and 1945.

In sum, it is no more appropriate today than in 1922 and 1945 for shippers to circumvent the ICC's jurisdiction by seeking damages for allegedly excessive rates through the antitrust laws rather than through the procedures and unique standards of lawfulness established in the Interstate Commerce Act. It is no more appropriate today to ask a jury to speculate about how the ICC would have treated a hypothetical rate that a plaintiff claims should have been filed. And a shipper that paid the lawful, published rate—no more, no less—has no more suffered "legal injury" now than when this Court decided *Keogh* six decades ago.

CONCLUSION

This case raises no novel or important question of law. There is no inconsistency among the circuits on any issue relating to shipper antitrust damage claims, this Court

[25] The principal "deregulatory thrust" of the Motor Carrier Act of 1980 was to lower entry barriers and eliminate antitrust immunity for collective ratemaking on single-line rates after July 1, 1984. These amendments are not relevant to this case, and Petitioners do not claim that any of the rates in issue here were "deregulated."

has continually cited *Keogh* with approval, and Congress has expressed its intent to preserve the statutory interpretation articulated by this Court in *Keogh* and *Georgia*. Finally, just last term this Court declined to reconsider the *Keogh* doctrine, and approved a "harsh" new damage remedy under the Interstate Commerce Act for shippers harmed by illegal ratemaking. For all of the above reasons, the Petition should be denied.

Respectfully submitted,

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August 2, 1985

APPENDICES

APPENDIX A

Pursuant to Supreme Court Rule 28.1, Respondents provide the following information:

1. Bondy Cartage Limited is a wholly-owned subsidiary of Henry P. Bondy Holdings Limited, and is affiliated with Bondy Freight Lines Inc.

2. Dominion-Consolidated Truck Lines Limited is a wholly-owned subsidiary of Dominion-Consolidated Holdings Limited, which is wholly-owned by The Woodbridge Company Limited. Dominion-Consolidated Truck Lines Limited is affiliated with The Hudsons Bay Company, Thomson Newspapers Limited, International Thomson Organization Limited and Talcorp Limited.

3. ICL International Carriers Limited is a wholly-owned subsidiary of RBS Enterprises Limited, which is wholly-owned by Yellow Freight System, Inc. of Delaware.

4. Inter-City Truck Lines (Canada) Limited is a wholly-owned subsidiary of NM Davis Corp. Limited.

5. The Niagara Frontier Tariff Bureau, Inc. has no parent, subsidiary or affiliated corporations.

6. TNT Canada, Inc. is a wholly-owned subsidiary of All Trans Canada, Inc., which is wholly-owned by Thomas Nationwide Transport Limited of Australia. TNT Canada, Inc. is affiliated with Alltrans International Group, Inc.; Ansett Transport Industries Limited; McIllwraith, McEacharn Limited; Trans Freight Lines, Inc.; Transmodal Cargoes, Inc.; and Trans Ocean Leasing Corp.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Master File No. MDL 587

IN RE LOWER LAKE ERIE
IRON ORE ANTITRUST LITIGATION

This Document Relates to:

Civil Action No. 84-2135
JONES & LAUGHLIN STEEL, INC.
v.
PENN CENTRAL CORP., *et al.*

Civil Action No. 84-2079
REPUBLIC STEEL CORP.
v.
PENN CENTRAL CORP., *et al.*

Civil Action No. 84-2134
NATIONAL STEEL CORP.
v.
PENN CENTRAL CORP., *et al.*

Civil Action No. 84-2138
WHEELING-PITTSBURGH STEEL CORP.
v.
PENN CENTRAL CORP., *et al.*

Civil Action No. 84-5562
SHARON STEEL CORP.
v.
PENN CENTRAL CORP., *et al.*

MEMORANDUM AND PRETRIAL ORDER NO. 4

FULLAM, J. June 5, 1985

In this multidistrict litigation (MDL), 11 antitrust suits have been consolidated in this court for pretrial proceedings. Among the many motions now before the court are defendant railroads' motions to dismiss or, in the alternative, for a stay pending reference of certain issues to the ICC, filed in the actions brought by the steel company plaintiffs.[1]

The steel companies, Jones & Laughlin Steel, Inc. (Jones & Laughlin), Republic Steel Corp. (Republic), National Steel Corp. (National), Wheeling-Pittsburgh Steel Corp. (Wheeling-Pittsburgh), and Sharon Steel Corp. (Sharon), allege (as do all of the MDL plaintiffs with minor variations) that from the mid-1950s "until at least 1980" the railroad defendants (The Penn Cen-

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[1] This Memorandum does not address Penn Central's motions to dismiss, which rest on alternative grounds. Those will be addressed in a subsequent memorandum.

tral Corp., The Chesapeake & Ohio Railway Co., The Baltimore & Ohio Railroad Company, CSX Corporation, Bessemer and Lake Erie Railroad Co., Pittsburgh and Lake Erie Railroad Co., Consolidated Rail Corp., Norfolk & Western Railway Co., and Norfolk Southern Corp.) and other non-defendant railroads conspired to destroy competition and monopolize dock-handling, storage and land transportation of iron ore and other bulk commodities along lower Lake Erie.

Accepting as true all of plaintiffs' allegations, as I must on a motion to dismiss, the relevant facts are as follows. Much of the iron processed into steel by plaintiffs originates in mines located in Michigan, Minnesota, and Eastern Canada. The ore is shipped across the Great Lakes and unloaded at docks along lower Lake Erie in Pennsylvania and Ohio. Many of these docks were and still are owned by defendant railroads, and these docks were the primary handlers of iron ore. For many years, the prevailing method of unloading bulk commodities was by means of huletts, large cranes affixed to the docks. The huletts lifted the ore and other bulk commodities from the ships, known as "bulkers" or "straight deckers"; the cargo was then placed either in waiting railroad cars for immediate transportation or in a location designated for later movement to storage. During the period of the alleged conspiracy, rates for these services at all of the railroad docks were identical. The non-railroad docks in the vicinity were not equipped with huletts, and thus could not compete for iron ore traffic.

In the 1950s, some iron ore producers began to "pelletize" their ore. This innovation made possible the transport of iron ore by means of already existing self-unloading vessels. These vessels, as their name implies, were capable of unloading themselves by means of a conveyor belt. According to plaintiffs, the self-unloaders greatly lessened dock-handling time, and with the advent of "super-size" self-unloaders in the 1960s, these ships

could carry twice the load carried by the conventional bulkers and could unload themselves in one-fourth the time at docks with no special handling equipment. Plaintiffs claim that the railroads, loath to lose supremacy in the iron ore trade to non-railroad docks, and fearful of losing their substantial investments in potentially useless off-loading equipment, determined to halt the progress of self-unloader technology,[2] in part by keeping dock-handling rates for self-unloaders artifically high. The railroads charged the steel companies the same dock-handling rates for the self-unloaders as they did for the bulkers, thereby diminishing the economic attractiveness of water shipment by self-unloaders.

A further aspect of the alleged conspiracy involves line haul rates, which are the rates charged by the railroads for transporting the ore and other commodities from specific docks to the plaintiffs' mills. Plaintiffs charge that the rates from defendant railroads' docks to all the steel mill customers were identical, notwithstanding the difference in distances. Moreover, plaintiffs charge that the private commercial or non-railroad docks[3] were effectively precluded from handling ore from the self-unloaders by defendants' refusal to publish competitive commodity line haul rates[4] from the private docks to the steel mills,

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[2] Litton Industries, at one time a producer of self-unloading vessels, has brought suit against defendant railroads on grounds identical to those present in these cases. That case, proceeding in the Northern District of Ohio, was not consolidated for pretrial purposes with the other actions in this MDL.

[3] Those docks are represented in this litigation by Erie-Western Pennsylvania Port Authority and Codan Corporation. Pinney Dock and Transport Company is also pursuing an action against the defendant railroads in the Northern District of Ohio; that action was not consolidated for pretrial purposes with the other actions in this MDL.

[4] Commodity line haul rates are, in general, cheaper than class line haul rates. Plaintiffs claim that Pittsburgh and Lake Erie Railroad Company tried to take independent action in establishing

and the concomitant inhibition of truck competition for land transportation.

The steel company plaintiffs charge that, by the conduct eludicated above, defendants violated §§ 1, 2 and 3 of the Sherman Act (15 U.S.C. §§ 1, 2, 3). Jones & Laughlin, Wheeling-Pittsburgh, and National also claim that this behavior gives rise to violations of the antitrust provisions of the District of Columbia Code (D.C. Code Ann. § 28-4501, 28-4502, 28-4503, 28-4508). All plaintiffs seek treble damages, attorneys fees, and costs pursuant to § 4 of the Clayton Act (15 U.S.C. § 15). Jones & Laughlin, Republic, and Wheeling-Pittsburgh also specifically seek injunctive relief pursuant to § 16 of the Clayton Act (15 U.S.C. § 26). (Sharon and National do not, but instead include a catchall request for other appropriate relief.)

I. PLAINTIFFS' CLAIMS FOR DAMAGES

Plaintiffs' damage claims are couched in terms of "denied savings," *i.e.*, they claim that the railroads' predatory behavior denied them (1) the across-the-board savings that would have resulted from swifter development of self-unloader technology; (2) the savings that would have resulted from lower dock-handling rates at private commercial docks had the self-unloader industry been more robust; (3) the savings that would have resulted from lower dock-handling rates at the railroad docks, had there been competition from private docks; (4) the savings that would have resulted from lower trucking rates, had such competition not been restrained; (5) the savings lost as a result of the railroads' artifically high line-haul rates; and (6) the savings plaintiffs would have realized had they had the option to choose the most effi-

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such competitive commodity line-haul rates in response to trucking competition in 1977, but was thwarted by pressure from other defendant railroads. Nevertheless, all railroads had published such competitive rates by March 1978.

cient and economical combination of transportation alternatives. *See, e.g.*, Complaint of National at ¶ 28.

Antitrust Immunity

The defendants in the present case are members of a protected and highly regulated industry, now charged with violating the antitrust laws. For the public good, participants in such industries are permitted a measure of freedom to cooperate with each other not enjoyed by those engaged in other endeavors, on the theory that the public's interest in preventing conspiracies in restraint of trade and monopolies must be partially subordinated to the public's need for the services being rendered. But, of course, this accommodation does not totally immunize the defendants from antitrust scrutiny.

The defendant railroads' limited antitrust immunity has two sources: the statutory immunity conferred by the 1948 Reed-Bulwinkle Amendment to § 5(a) of the Interstate Commerce Act (ICA) and the opinion of the Supreme Court in *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156 (1922).

Keogh was a manufacturer of excelsior and flax, who shipped his goods via defendant railroads. The railroads were members of an association through which uniform interstate rates were set. These rates had been duly filed with the Interstate Commerce Commission (ICC); moreover, the rates had been investigated by the Commission and found reasonable. Nevertheless, Keogh claimed that the rates were discriminatorily set by an unlawful conspiracy in violation of the antitrust laws.

The Court ruled otherwise; it held that the shipper could not recover treble damages "because he lost the benefit of rates still lower, which, but for the conspiracy he would have enjoyed." 260 U.S. at 162. Justice Brandeis, writing for a unanimous court, gave several reasons for this result. First, he noted that the "Act to

Regulate Commerce" (the ICA) is the proper vehicle for determining the legality of a rate. Under its enforcement provision (now at 49 U.S.C. § 11705), a shipper could receive actual damages and attorneys fees. He questioned whether Congress could have "intended to provide the shipper, from whom illegal rates had been exacted, with an additional remedy under the Anti-Trust Act." *Id.* at 162.

Second, Justice Brandeis stated:

> The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.

Id. at 163. To rule otherwise, he concluded, would allow piecemeal discrimination in favor of shippers who chose to litigate. Finally, Justice Brandeis concluded that the damages sought were both hypothetical and speculative.

Plaintiffs here contest the application of *Keogh* to these cases, arguing that the immunity it provided was subsumed by the express immunity conferred by the Reed-Bulwinkle Act, that subsequent rulings of the Supreme Court demonstrate that *Keogh* is distinguishable on its facts from the present cases, and that its rationale is no longer compelling. For the reasons that follow, I reject plaintiffs' arguments.

The Reed-Bulwinkle Act amended the ICA to allow the railroads to enter into agreements to establish jointly rates, classes, routes, and the like, so long as these agreements are first approved by the ICC. *See* Pub. L. No. 80-662, 62 Stat. 472 (1948) (amending § 5(a) of the ICA) (current version *as amended* at 49 U.S.C. § 10706). In order to gain approval, such agreements must preserve the right of any party to act independently. *See* 49 U.S.C.

§ 10706(d)(2)(C). So long as the procedures set forth in the agreement for joint activity are followed, railroads are shielded from antitrust liability for that activity.[5] Under the statutory provisions in effect during the bulk of the alleged conspiracy period, any party, including the ICC, could initiate proceedings to determine whether the rates so promulgated were reasonable and/or whether they were issued pursuant to appropriate agreement procedures.[6] If the ICC concluded that the filed rates were improper for any reason, it could disapprove them and, if circumstances warranted, award the complainant its actual damages, together with costs and attorneys fees. *See* 49 U.S.C. §§ 10706, 10762, 11705.

An exhaustive review of the legislative history of the Reed-Bulwinkle Amendments is found in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, No. 84-7831 (2d Cir. Apr. 9, 1985), in which the court rejected every argument pressed by plaintiffs here, and concluded that

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[5] The defendant railroads are parties to the Eastern Railroads Agreement. *See* 277 ICC 279 (1950). The Coal, Coke and Iron Ore Committee (CCIOC) was established by defendants to carry out the agreement by, *inter alia*, meeting publicly to discuss and propose rates. Plaintiffs charge that defendants failed to comply with the agreement procedures in setting rates, although this charge is only a corollary to plaintiffs' larger concern with the railroads' predatory behavior.

[6] Significant changes have been made in the jurisdiction of the ICC by recent legislation. *See* The Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980); The Railroad Revitalization And Regulatory Reform (4R) Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976). Although the ICC's power to regulate rates has been curtailed, it still possesses the authority to ensure that rates are promulgated pursuant to approved agreements and to award damages, costs, and attorneys fees as reparation for illegal rates. In any event, much of the conspiracy here alleged occurred before the enactment of the amendments alluded to above, and plaintiffs have not suggested that these amendments are in any way outcome determinative.

the rule of *Keogh* is still valid.[7] In light of the admirable summary presented by Judge Friendly in *Square D*, I will present here only a brief capsulization of the relevant history. In *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 401 (1945), decided shortly before the enactment of Reed-Bulwinkle, the Court held that *Keogh* barred Georgia from recovering treble damages in its *parens patriae* suit against defendant railroads for price-fixing on the basis of rates paid by private shippers. The Court noted, however, that *Keogh* was not a bar to government or so-called public antitrust actions against the railroad; nor did it prevent private shippers from obtaining injunctions against conspiratorial behavior, a matter not within the jurisdiction of the ICC. *See id.* at 454-55. Nor does *Keogh* apply to suits by competitors. *See, e.g., Pinney Dock and Transport Co. v. Penn Central Corp.*, No. C80-1733, slip op. at 46 (Memorandum and Order denying Motion to Dismiss) (N.D. Ohio Aug. 26, 1983).

There being a general consensus to the effect that the public would be better served by filling some of the gaps alluded to in *Georgia*, at least to the extent that railroads could not be subjected to antitrust liability by any entity for the appropriate joint setting of rates, routes, fares, classifications, etc., Reed-Bulwinkle was enacted. As Judge Friendly points out in *Square D*, Congress had been reminded of *Keogh* several times during the hearings that preceded the bill's enactment (*see Square D, supra*, slip op., at 3269-70), and nevertheless announced:

> The bill leaves the antitrust laws to apply with full force and effect to carriers, *so far as they are*

[7] As transferee judge, I am bound to apply the law as if I were sitting in the transferor district. *See Manual for Complex Litigation* § 5.22 n.410 at 197 (2d ed. 1984). Hence, I am bound by the Second Circuit's determination in *Square D, supra,* in ruling on the present motion in the *Republic Steel* case, which was filed in the Southern District of New York. The other four cases were filed in the District of Columbia; I am aware of no binding precedent treating *Keogh* in that Circuit.

> *now applicable*, except as to such joint agreements or arrangements between them as may have been submitted to the Interstate Commerce Commission and approved by that body . . . .

H.R. Rep. No. 1100, 80th Cong., 2d Sess., *reprinted in* 1948 U.S. Code Cong. & Ad. News 1844, 1848 (emphasis added).

Several courts have thus rightly held that *Keogh* was not swallowed up by Reed-Bulwinkle. *See, e.g., Square D, supra*; *In the Matter of Wheat Rail Rate Antitrust Litigation*, Nos. 84-1883, 84-1505 (7th Cir. Apr. 17, 1985). As I noted above, *Keogh* held that shippers could not pursue antitrust claims for treble damages against railroads on the basis of *filed rates* (although plaintiffs dispute this latter characterization, *see* discussion *infra*). Reed-Bulwinkle extended that protection by granting immunity against suits from *all* comers, not simply shippers, for all matters, not simply filed rates, that were jointly undertaken in compliance with an ICC-approved agreement; thus, the simple act of filing rates would not be sufficient to warrant Reed-Bulwinkle protection, but would, under the right circumstances, warrant *Keogh* protection. In view of Congress' expressed intention that Reed-Bulwinkle only add to the railroads' existing antitrust protection, it would be improper to shun *Keogh* on this basis.

Finally, as Judge Friendly noted:

> Beyond this, the legislative history contains no suggestion of any intention to overrule *Keogh*, and it is somewhat difficult to suppose that an act for relief of railroads silently operated against them in so material a respect.

Square D, supra, slip op. at 3269.

Plaintiffs next contend that their cases do not fall within the proscriptions of *Keogh*, since (1) *Keogh* was a "rate" case, and in this case a much broader conspiracy

is alleged, rates being only a "symptom" of the problem, and (2) the rates in *Keogh* had been approved by the ICC, whereas the rates charged here were simply filed with the ICC, thus occasioning no conflict between agency and court jurisdiction.

I do not find these arguments persuasive. Although it is true that the conspiracy alleged goes farther than the mere fixing of rates, that does not divest the court of its duty to ensure that antitrust immunity is afforded as the law directs. The attempts of both sides of this litigation to label it as a rate matter or a monopolization matter do little to advance the inquiry. I am aware of no law that dictates that I view these actions with tunnel vision; on the contrary, a legal line has been drawn by the *Keogh* court which I am not free to cross, no matter how "artificial" it may seem to plaintiffs. *See, e.g., Square D, supra,* slip op. at 3248-49, 3282 ("A shipper [should be allowed to amend its complaint and] may recover damages if it can show that carriers caused injury to the shippers' business or property other than by higher tariffs, such as by impeding its ability to transport its goods to other markets and thus decreasing its sales."). The portion of plaintiffs' damage claims which involves rates must, under *Keogh*, be separated from the rest of the action.

And this is so whether the rates at issue have been approved by the ICC or simply filed with that body. *See, e.g., Square D, supra,* slip op. at 3280. As noted above, Justice Brandeis clearly stated in *Keogh* that the filed rate is "the legal rate" under the ICA unless and until the rate is disallowed by the ICC or otherwise displaced. 260 U.S. at 163. Notwithstanding this straightforward language, plaintiffs argue that subsequent Supreme Court decisions have revealed that ICC approval is a prerequisite to *Keogh* immunity. In *Hanover Shoe, Inc. v. United Shoe Machinery, Inc.*, 392 U.S. 481 (1968), the Court rejected the "passing on" defense to claimed overcharges in antitrust suits. The *Hanover* Court took note of *Keogh*

in a footnote, since Justice Brandeis had appeared to give credence to that defense. He wrote that the same legal rate had been exacted from all shippers, and that a lower rate (one that would have existed but for the conspiracy)

> might not have benefitted [*Keogh*] . . . . Under these circumstances, no court or jury could say that, if the rate had been lower, *Keogh* would have enjoyed the difference between the rates or that any other advantage would have accrued to him. The benefit might have gone to his customers, or conceivably, to the ultimate consumer.

Keogh, 260 U.S. at 165. The *Hanover* Court stated that in *Keogh* "[b]ecause the rates had been approved as reasonable after a proceeding before the Interstate Commerce Commission, the shipper was held to have no cause of action under the antitrust laws . . . . We ascribe no general significance to the *Keogh dictum* for cases where the plaintiff is free to prove that he has been charged an illegally high price." *Hanover*, 392 U.S. at 491 n.8. It is thus clear that the concern of the *Hanover* Court was to distance itself from one of several arguments advanced by Justice Brandeis in support of his ruling in *Keogh*. The Court did not, and indeed had no need to focus on the issue of filed rates versus approved rates. Hence, it would be folly to hold that the dictum in *Hanover* rejecting the dictum in *Keogh* in any way detracts from the holding of the latter.[8]

In *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 20 (1966), the Court held that a shipper in foreign commerce could maintain an antitrust action

[8] The same may be said with respect to *Terminal Warehouse Co. v. Pennsylvania R.R. Co.*, 297 U.S. 500 (1936), which the plaintiffs argue is inconsistent with *Keogh*. But, although the *Terminal Warehouse* Court found *Keogh* "apposite and helpful", it stated that it was not "decisive". *Id.* at 511. Its musings regarding when an antitrust action may be pursued by a shipper are *dicta* and cannot be constructed to alter *Keogh*. *Id.* at 515.

for treble damages against maritime conferences and their members based on rates set without prior approval of the Federal Maritime Commission (FMC) pursuant to the Shipping Act. The Shipping Act, like the ICA, provides the commercial maritime industry with limited antitrust immunity for rates jointly set in accordance with FMC-approved agreements. *See* 46 U.S.C. § 814. Without mention of *Keogh*, the Court held that if rates were set pursuant to an unapproved agreement, the carriers could be subjected to antitrust liability for joint rate-setting. Paying due heed to the doctrine of primary jurisdiction, the Court concluded that such an antitrust action, whether for damages or for an injunction, should be stayed pending the FMC's resolution of whether the rates were set in conjunction with an approved agreement. *Id.* at 221, 223. If the FMC should find that the rates were not lawfully set, the shipper would then have the option of seeking recovery under the Shipping Act or under the antitrust laws. *Id.* at 224.

The shippers in the present cases do not overtly argue that *Carnation* overrules *Keogh sub silentio*, but that it limits its application to approved rate cases. But the *Carnation* Court was concerned with unapproved *agreements*, not unapproved *rates*.[9] Moreover, it was construing an exemption contained not in the ICA, but in the Shipping Act, a statute which, albeit similar in many respects to the ICA, is not at issue in the present cases. Nor was the *Keogh* Court confronted with a statutory exemption of any kind, since none existed in the ICA at that time.

Hence, I must reject plaintiffs' contention that *Keogh* does not apply to this case, and with it their arguments regarding the changing regulatory climate. *Keogh* con-

[9] Indeed, one might venture that if *Keogh* were to be read as an approved rate case, the *Carnation* Court would have cited it as support for its position that in un- or dis-approved rate cases, an antitrust action could lie.

tinues to be cited by the Court as good law. *See, e.g., ATA v. McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 243 (1980). *See also Minsky v. Auto Driveaway Co.*, 757 F.2d 718 (7th Cir. 1984); *Square D, supra; Wheat Rail Cases, supra; Essential Communication Systems, Inc. v. American Telephone & Telegraph Co.*, 610 F.2d 1114, 1121-22 (3d Cir. 1979). Although plaintiffs may well be correct in arguing that the Supreme Court would elect to overrule *Keogh* if it had the opportunity to do so today, that is not for this court to decide.

Thus, insofar as plaintiffs' damage claims are based on rates charged the plaintiffs by defendant railroads—all dock-handling and storage rates at railroad docks and railroad line haul rates (class or commodity) from private and railroad docks—their claims will be dismissed.

As I read the various complaints, this leaves the steel companies with two presently animated antitrust claims: (1) that they could have paid lower dock-handling rates (sooner) to the private docks than they did to the railroad docks if the railroads had not retarded the development of the self-unloader industry; and (2) that they could have paid lower land transport rates (sooner) to the truckers, had the railroads not restrained competition by that industry and monopolized line-hauling from their docks.[10] In my view, plaintiffs' generalized claims regarding savings they would have realized had defendants not impeded self-unloader development and had they been able to choose the most economic combination of

[10] In Jones & Laughlin's summary of facts, presented to the transferor court but not alluded to in its present motion to dismiss, it contends that the railroads intended to "cramp" the trucking industry by, *inter alia*, threatening "elimination of services to steel companies." Puzzingly, however, no such allegation of a refusal to deal by the railroads is found in any of the present steel company complaints, nor for that matter, in the complaints of the trucking companies. Hence, none is now properly before the court.

transportation alternatives come within these two categories.

Defendants vigorously contest plaintiffs' standing to pursue these remaining claims.

B. *Antitrust Standing*

The definition of who may be an antitrust plaintiff has been an elusive one. From the wording of § 4 of the Clayton Act (15 U.S.C. § 15), one might not have imagined that such a problem would evolve:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the cost of suit, including a reasonable attorney's fee.

Read literally, this all-encompassing language would seem to contemplate litigation recoveries by all who claim to have suffered any form or degree of antitrust injury. But the courts do not read this section literally; indeed, over the years, the appellate courts have devised a variety of tests, through which prerequisites for maintaining suit beyond the simple allegation of injury have been engrafted upon this language. *See Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958, 964, n.12 (3d Cir. 1983) (and cases cited therein).

In *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), the Supreme Court attempted to harmonize the various standards by setting forth a list of factors which are to "circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances." *Id.* at 357. As elucidated by our court

of appeals in *Merican, supra*, those factors are (1) the causal connection between the alleged antitrust violation and the harm to plaintiff (specific intent to harm plaintiff is not required); (2) the nature of plaintiff's injury (Is it the sort of injury Congress intended § 4 to address, and does it flow from the unlawful nature of defendant's acts?); and (3) the directness or indirectness of the injury. *Merican*, 713 F.2d at 964-65 & nn.13-15 (citing *Associated General Contractors*, 459 U.S. at 537-40).

The latter factor requires an analysis of (a) whether there exists "an identifiable class of persons whose self-interests would normally motivate them to vindicate the public interest"; (b) the speculative nature of the damages; (c) the potential for duplicative recovery; and (d) the danger of the court becoming involved in complex apportionment of damages. *Associated General Contractors*, 459 U.S. at 541-44; *Merican*, 713 F.2d at 965 n.15. This final set of considerations is precisely the one focused upon in *Hanover Shoe, Inc., supra*, and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); in *Hanover*, the Court rejected the "passing on" (of the overcharge) defense to the claim of an innocent middleman in a price-fixing scheme, and in *Illinois Brick*, the Court completed its thought: it barred the indirect purchaser from maintaining an antitrust action based on the overcharge.

Although plaintiffs clearly allege the requisite form of injury, and thereby satisfy the second requirement of *Associated General Contractors*, their claims cannot withstand the scrutiny mandated by factors 1 and 3.

With respect to factor 3, the Third Circuit's opinion in *Mid-West Paper Products Co. v. Continental Group*, 596 F.2d 573 (3d Cir. 1979), is instructive. The *Mid-West Paper* court applied the *Hanover Shoe-Illinois Brick* rationale to a case without a middleman,[11] a case ana-

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[11] Criticism of the *Mid-West Paper* court should now be abated in light of the ruling in *Associated General Contractors* to the effect that these factors are of concern in any antitrust case.

logous in many respects to those presently under consideration. The court held that a customer of a non-conspiring competitor of defendant supplier could not maintain an antitrust action based on an "umbrella" pricing theory (*i.e.*, the notion that the effect of defendant's conduct in an oligopolistic market was to inflate the prevailing market rates charged by all competitors in the relevant market, and not simply by defendant). In an analysis which mirrors that prescribed by *Associated General Contractors*,[12] the court conceded that the nature of plaintiff's injury was within the reach of the antitrust laws (factor 2), but ruled that the chain of causation was too speculative (factor 1) and the amount of the damages too conjectural (factor 3). *Id.* at 584. Said the Court:

> The outcome of any attempt to ascertain what price the defendants' competitors would have charged had there not been a conspiracy would at the very least be highly conjectural. As noted in *Hanover Shoe*, "[a] a wide range of factors influence a company's pricing policies. Normally, the impact of a single change in the relevant conditions cannot be measured after the fact; . . . ."

Id.

The *Mid-West Paper* opinion was not met with universal agreement (*see, e.g., In re Uranium Antitrust Litigation*, 552 F. Supp. 518, 523 (N.D. Ill. 1982) (and cases cited therein).[13] Nevertheless, I am persuaded that

[12] The *Mid-West Paper* analysis was cited with approval by the post-*Associated General Contractors Merican* court. *See* 713 F.2d at 965 n.15.

[13] But neither the Second Circuit nor the District of Columbia Circuit has rejected *Mid-West Paper*; indeed, the Second Circuit embraced its reasoning in *Reading Industries, Inc. v. Kennecott Copper Corp.*, 631 F.2d 10, 14 (2d Cir. 1980), *cert. denied*, 452 U.S. 916 (1981). Hence, I perceive no problem with alluding to it here. *See* n.7 *supra*.

the *Hanover Shoe-Illinois Brick* rationale applies with even more force in the present circumstances (where plaintiffs are only potential customers of non-conspiring competitors) than in the *Mid-West Paper* scenario. With respect to plaintiffs' first claim—that they could have paid less sooner to the private dock owners had the railroads not retarded the development of self-unloaders—the plaintiffs ask the court to engage in an exercise in prophecy. I have not lost sight of the fact that plaintiffs claim they can prove that the private docks did charge less than the railroads when they finally began to avail themselves of the self-unloaders. Nevertheless, had the railroads not interfered, when would the private docks have begun to handle the self-unloaders? Moreover, even if a date could be pinpointed with reasonable accuracy, there is no assurance that the rate charged would be the rates alluded to by plaintiffs. As the *Mid-West Paper* court observed, quoting *Hanover Shoe*, "[a] wide range of factors influence a company's pricing policies." 596 F.2d at 584 (quoting 392 U.S. at 492). This is precisely the sort of complex apportionment of damages which the Supreme Court has warned must be avoided. Furthermore, there exist in this litigation two identifiable classes which are actively pursuing their antitrust remedies against the defendants—the self-unloader manufacturer, Litton, and the non-railroad dock owners, Pinney and Erie-Western.

I also note my firm belief that these damages are actually claims for overcharge in other clothing.[14] Although plaintiffs claim to be seeking recovery for "lost savings," this is only an exercise in semantics. What plaintiffs actually seek is reimbursement for the inflated rates they suffered as a result of defendants' predatory practices;

[14] The tortured nature of the description of the surviving claims is probably in direct proportion to the tenuousness of their causation. In any event, I need not rule on this factor in view of the findings expressed above.

while this brings plaintiffs out from under the constraints of *Illinois Brick* (*i.e.*, they are no longer indirect potential purchasers), it runs them squarely into the brick wall of *Keogh*.[15]

I need not repeat the above analysis with respect to plaintiffs' claim for denied savings on truck hauling because of defendants' conspiratorial and monopolistic behavior; it is the same. I will only add that five trucking concerns are currently pursuing their antitrust remedies against the defendants in this MDL.

All of plaintiffs' damage claims must therefore be dismissed. But plaintiffs will be granted leave to amend their damage claims in accordance with this Memorandum, if it is possible for them to do so. *See Square D*, slip op. at 3248-49 (quoted at p. 12 *supra*).

II. PLAINTIFFS' CLAIMS FOR INJUNCTIVE RELIEF

Neither *Keogh* nor the antitrust standing restrictions that have grown out of § 4 affect plaintiffs' ability to

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[15] No matter which view is taken of these claims, *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), which plaintiffs advance in support of their position, is inapposite. In *McCready*, plaintiff challenged Blue Cross' policy of refusing to reimburse subscribers for fees paid to psychologists for psychotherapy, while at the same time reimbursing such fees when paid to psychiatrists. The Court noted at the outset that the *Illinois Brick* rationale did not apply since there was no risk of duplicative recovery and nothing speculative about the damages (precisely equal to McCready's out-of-pocket expenses). Moreover, the court observed that McCready's injury was not remote, since "it was a necessary step in effecting the ends of the alleged conspiracy." *Id.* at 479. *McCready* is readily distinguishable from the present litigation since here the indirect damages are clearly speculative and since the savings allegedly denied the plaintiffs did not constitute a "necessary step" in the effectuation of the conspiracy—they are consequential. And I note, parenthetically, that *McCready* cannot be construed to impinge on the holding of the later-decided *Associated General Contractors, supra.*

maintain actions for injunctive relief (although, curiously, no one has addressed this issue). *See, e.g., Square D*, slip op. at 3280-81; *Weiss v. York Hospital*, 745 F.2d 786, 806-07 (3d Cir. 1984). The only possible complication with respect to this issue is whether the discretionary doctrine of primary jurisdiction requires that the actions be stayed pending referral to the ICC. In my view, neither stay nor referral is required.

The policy underlying primary agency jurisdiction is to avoid conflict between the roles of court and agency, and to utilize special agency expertise while conserving the resources of the court. In these actions, plaintiffs seek a finding that defendants' conduct violated antitrust laws and an injunction ordering an end to that behavior and barring defendants from resorting to such illegal combinations in the future. The ICC does not have the power to issue such an injunction. *See Georgia*, 324 U.S. at 454-55, *cited in Square D*, slip op. at 3281. Moreover, there are no underlying facts to be established that could best be sifted by the ICC; the issue here is not whether the railroads conformed to a rate agreement, but whether they engaged in a broad-based conspiracy. As a panel of the District of Columbia Circuit noted in the criminal adjunct to this civil litigation:

> [Reed-Bulwinkle] immunity reaches only those actions factually taken "in conformity with" the rate agreement and the terms and conditions laid down by the ICC. It does not sweep within it a larger conspiracy which utilizes a Section 5a rate bureau as a means to an end; it does not legitimate illegal schemes which happen to coincide at points with the legitimate actions of a rate bureau.

United States v. Bessemer and Lake Erie R.R. Co., 717 F.2d 593, 600 (D.C. Cir. 1983).

In view of this, I perceive no reason why the matter, now devoid of all rate-based damage claims, should be

referred to the ICC; plaintiffs may proceed with their claims for injunctive relief.[16]

III. DISTRICT OF COLUMBIA CLAIMS

Plaintiffs Jones & Laughlin, National, and Wheeling-Pittsburgh also charge defendants with violations of the antitrust laws of the District of Columbia. *See* D.C. Code Ann. §§ 28-4501, 28-4502, 28-4503, 28-4508. Defendants assert that these pendent claims must be dismissed since (1) the D.C. Code must be construed in a manner consistent with federal law (which, in light of the conclusions expressed above, would leave standing plaintiffs' injunction claims); (2) none of the trade or commerce alleged to have been restrained is within the District of Columbia; and (3) application of the D.C. Code to these cases would violate the Commerce Clause of the U.S. Constitution.

In my view, defendants' second argument is dispositive; in order to obtain relief under District of Columbia law, plaintiffs must allege that defendants' conduct restrained trade in the District. That law provides:

> Every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce, all or any part of which is within the District of Columbia, is declared to be illegal.

D.C. Code Ann. § 28-4502. Section 28-4503 provides:

> It shall be unlawful for any person to monopolize, attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of trade or commerce, all or any part of which is within the District of Columbia.

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[16] Although, as I noted above, neither Sharon nor National specifically requested injunctive relief, they did include catch-all requests and predicated the court's jurisdiction, *inter alia*, on 15 U.S.C. § 26 (§ 16 of Clayton Act) which addresses injunctive relief. Hence, their complaints will be construed to include such claims.

In my view, the above-quoted language, read together and individually,[17] clearly requires that, before the alleged offensive conduct can rise to the level of an antitrust violation, it must restrain trade or commerce in the District of Columbia.

In so construing the statutes to require local effect as a jurisdictional prerequisite, I do nothing unusual. I note first that the stated purpose of the law is "to promote the unhampered freedom of commerce and industry throughout the District of Columbia by prohibiting restraints of trade and monopolistic practices." D.C. Code Ann. § 28-4501(b). Clearly, the concern is with local trade.

Second, this chapter of the Code also provides that

> [i]t is the intent of the Council of the District of Columbia that in construing this chapter, a court of competent jurisdiction may use as a guide interpretations given by federal courts to comparable antitrust statutes.

Id. § 28-4515. Section 1 of the Sherman Act is a comparable antitrust statute: "Every contract, combination in the form of trust or otherwise, or conspiracy, *in restraint of trade or commerce among the several states, or with foreign nations*, is declared to be illegal . . ." (emphasis added). Federal courts routinely construe the emphasized language as a jurisdictional prerequisite which must be pleaded. *See, e.g., McLain v. Real Estate Board of New Orleans*, 444 U.S. at 242.

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[17] Admittedly, a strained reading of § 28-4501 could lead one to conclude that any conspiracy, etc., any part of which occurs in the District, which has as its effect the restraint of trade anywhere (in or out of the District), is illegal. But the language of the next section counsels that such an interpretation would be unwise; for various reasons of grammatical immutability, it clearly demonstrates that the phrase "all or any part of which is within the District of Columbia" is meant to modify "trade or commerce," and not "contract, combination . . . or conspiracy." *See also* the following discussion in the text on the chapter's purpose and proposed rules of construction.

In this regard, plaintiffs' complaints are lacking. In their complaints, they allege that all of the defendants reside, are found, transact business, or have agents in the District of Columbia. This allegation may suffice for Sherman Act venue purposes,[18] but clearly does not support plaintiffs' claims for breach of the substantive law of the District of Columbia. In further support of venue in the District, Jones & Laughlin and Wheeling-Pittsburgh (but not National) do allege that "[c]ertain of the unlawful acts alleged herein were performed *or had effects within the District of Columbia*." Complaints of Jones & Laughlin and Wheeling-Pittsburgh, ¶ 2 (emphasis added). But in those portions of their complaints entitled "Trade and Commerce", these plaintiffs (and National) state only that "[t]he violations of law alleged herein occurred in and substantially and adversely affected interstate and foreign commerce." *Id.* at ¶ 14; *see also* complaint of National, ¶ 9.

National thus makes no allegation of restraint of trade in the District of Columbia, while the allegations of Jones & Laughlin and Wheeling-Pittsburgh in that regard are, at best, ambiguous. In response to the present motions to dismiss, the latter argue only that they have "alleged a *conspiracy* which took place, at last [sic] in part, within the District of Columbia." [19] Brief of Jones & Laughlin

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[18] In so stating, I express no opinion on the motions of Norfolk and Western Railway to dismiss the *Jones & Laughlin* and *Wheeling-Pittsburgh* actions for lack of venue. That motion will be addressed in a subsequent Memorandum and Order.

[19] Jones & Laughlin points out in its summary of facts that in the companion criminal case, it was established that two overt acts evidencing the conspiracy occurred in the District of Columbia: (1) the filing of tariffs with the ICC and (2) a meeting of the conspirators on July 6, 1976, to discuss trucking competition. Summary at 30. Even assuming that I could properly take note of these "facts", plaintiffs' claims would still be deficient, since, in my view, the fact that a part of the conspiracy occurred in the District of

at 76 (emphasis added). Curiously, in response to defendants' square challenge on the issue, plaintiffs do not even allude to the "effects" language contained in the venue allegations of their complaints.

Hence, I conclude that none of the three plaintiffs has properly pleaded its District of Columbia claims. Those claims will therefore be dismissed, but with leave to amend.

An appropriate Order follows.

Columbia (while perhaps sufficient to establish venue, *but see* n.18 *supra*) is in itself insufficient to state a claim under District law. *See* n. 17 *supra*.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Master File No. MDL 587

IN RE LOWER LAKE ERIE
IRON ORE ANTITRUST LITIGATION

This Document Relates to:

Civil Action No. 84-2135

JONES & LAUGHLIN STEEL, INC.

v.

PENN CENTRAL CORP., *et al.*

Civil Action No. 84-2079

REPUBLIC STEEL CORP.

v.

PENN CENTRAL CORP., *et al.*

Civil Action No. 84-2134

NATIONAL STEEL CORP.

v.

PENN CENTRAL CORP., *et al.*

Civil Action No. 84-2138

WHEELING-PITTSBURGH STEEL CORP.

v.

PENN CENTRAL CORP., *et al.*

Civil Action No. 84-5562

SHARON STEEL CORP.

v.

PENN CENTRAL CORP., *et al.*

ORDER NO. 4

AND NOW, this 5th day of June, 1985, in consideration of the motions of defendants Chesapeake & Ohio Railway Co., Baltimore & Ohio Railroad Co., Norfolk & Western Railway Co., Norfolk Southern Corp., Pittsburgh & Lake Erie Railroad Co., Bessemer & Lake Erie Railroad Co., Consolidated Rail Corp., and CSX Corp. to Dismiss the above-captioned actions or for a Stay Pending Reference of Certain Issues to the ICC, and the responses and replies thereto, it is ORDERED.

1. Defendants' Motions are hereby GRANTED with respect to plaintiffs' claim for damages, costs, and attorneys' fees. Said claims are DISMISSED WITHOUT PREJUDICE. Plaintiffs may file amended complaints in accordance with the foregoing Memorandum within thirty (30) days of the date of this Order.

2. Defendants' motions are hereby DENIED with respect to plaintiffs' claims for injunctive relief.

3. Defendants' motions are GRANTED with respect to the claims of plaintiffs' Jones & Laughlin, Wheeling-Pittsburgh and National for relief pursuant to the Dis-

trict of Columbia Code. Said claims are DISMISSED without prejudice. Plaintiffs may file amended complaints in accordance with the foregoing Memorandum within thirty (30) days of the date of this Order.

John P. Fullam
J.

Entered: 6-6-85
Clerk of Court